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Supreme Court, U.S.
FILED

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No. 99-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

EDGAR ORLANDO MENJIVAR,
ROBERT MANN, and *DONALD W. COOK,*

Petitioners,

vs.

OFFICER WILES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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22pp

QUESTIONS PRESENTED

1. Before imposing sanctions against a party and his attorney under a court's inherent power to award sanctions, does due process guarantees demand that the court give the party and his attorney notice and an opportunity to be heard on the court's intend to award sanctions under the court's inherent authority?

2. Under the court's inherent power to award sanctions against a party or his attorney, may the court order payment of sanctions to a non-party?

LIST OF PARTIES

Petitioner Edgar Orlando Menjivar was plaintiff and appellant in the courts below. Petitioners Robert Mann and Donald W. Cook were Mr. Menjivar's attorneys in the courts below, and co-appellants before the Ninth Circuit. Respondent Officer Wiles was defendant and appellee in the courts below. The City of Santa Monica and James T. Butts, although parties at one time in the trial court, had been dismissed and hence, were not parties in the later trial proceedings or in the court of appeals.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

EDGAR ORLANDO MENJIVAR,
ROBERT MANN, and *DONALD W. COOK,*

Petitioners,

vs.

OFFICER WILES,
Respondent.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, filed in this proceeding on April 13, 1999.

OPINION BELOW

The decision of the Court of Appeals is not reported. appears in the Appendix hereto [hereinafter "Apx."], Appendix A. No opinion was rendered by the District Court for the Central District of California. The judgment of the district court appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on April 13, 1999. Apx. A1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 19, 1999. Apx. B1. This petition for certiorari was filed within 90

days of April 19, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy or life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

A. The District Court Proceedings.

On December 12, 1991, Santa Monica police arrested Edgar Orlando Menjivar. Mr. Menjivar claimed that a large German Shepherd police dog attacked and bit him where such force was unnecessary, unreasonable, and in violation of the Fourth Amendment. Mr. Menjivar also claimed that a police beating, consisting of repeated blows, kicks and strikes administered concurrently with the dog attack, was excessive and unreasonable.

On January 11, 1993, under 42 U.S.C. § 1983, plaintiff filed suit. Appellants' Excerpts of Record ("AER") 1-11 (Complaint). After the case was removed to federal court, defendant Jeffrey Wiles, the dog handler, moved for summary judgment. The trial court

granted the motion, disregarding Mr. Menjivar's testimony that Wiles ordered the dog to attack and bite Mr. Menjivar while he lay on the ground handcuffed and passive, and then kicked and struck him. Plaintiff appealed. By Memorandum decision filed March 25, 1997, the Ninth Circuit reversed, concluding that "no reasonable police officer could have believed that it was lawful to kick Menjivar or sic a canine on him as he was lying on his stomach with his hands cuffed behind his back." Memorandum decision, page 2 (Ninth Cir. No. 95-56702.) The case against Wiles was remanded for trial.[1]

Following pretrial proceedings, AER 13-22, the district court set the matter for jury trial on December 2, 1997. On that date Plaintiff's counsel Donald W. Cook appeared; plaintiff Mr. Menjivar did not despite having been informed of the trial date. AER 39 at ¶3. Consequently, the trial court dismissed the case with prejudice for failure to prosecute. AER 23.

A few days later defendant and respondent Wiles moved for an award of $7,500 in attorneys' fees, to be paid by plaintiff *and* his counsel, Robert Mann and Donald W. Cook. Defendant Wiles also asked that the fees be paid to the City of Santa Monica, Wiles' employer. AER 53, item 83. The motion was based on 42 U.S.C. § 1988 and Rule 11, Federal Rules of Civil Procedure. AER 24-25; Apx. A2. Wiles argued that his attorney incurred $7,500 in fees because "plaintiff's counsel was unable to contact his client and . . . failed to advise defense counsel of that fact." The fees represented defense counsel work in trial preparation which would not have been undertaken (or so defense counsel claimed) had plaintiff's counsel advise defense counsel of the difficulty he was having in contacting his client. AER 30, 32-33 at ¶¶5-6.

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[1] In the earlier appeal, the Ninth Circuit affirmed the dismissal of the case against the City of Santa Monica. Thereafter, the city was no longer a party.

Mr. Menjivar opposed the motion, pointing out:

(1) Fees cannot be imposed on plaintiff's *counsel* under 42 U.S.C. § 1988;

(2) Fees cannot be imposed on plaintiff under 42 U.S.C. § 1988 because his action was not frivolous or without merit – see the March 25, 1997 Memorandum decision by this Court reversing summary judgment in Wiles' favor;

(3) Fees cannot be imposed against either plaintiff or his counsel under Rule 11 because neither signed any "pleading, written motion, [or] other paper" which could form the basis of Rule 11 sanctions.

See AER 35-40 (plaintiff's opposition).

Wiles filed no reply to petitioners' opposition.

The trial court granted Wiles' motion in its entirety, ordering plaintiff and his counsel, "jointly and severally" liable for $7,500 in fees, to be paid to the City of Santa Monica, a non-party. Apx. C1-C2. The trial court's decision did "not indicate the authority relied upon to award attorney's fees." Apx. A2 (Memorandum decision).

B. The Ninth Circuit's Decision.

On appeal, petitioners repeated the arguments they made in the trial court, pointing out the absence of legal basis to impose sanctions under Rule 11 or 42 U.S.C. § 1988. In opposition, for the first time respondent argued that the trial court's imposition of monetary sanctions could now be sustained, *post hoc*, under the court's inherent power to award sanctions, see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 25 (1991). The Ninth Circuit panel affirmed, upholding the fee award because the trial court has the "inherent power to sanction bad faith acts of members of the bar," Memorandum decision at A2-A3 (citing

Chambers v. NASCO, Inc., *supra*), and the "bad faith is patent from the record." Memorandum decision at A3. Consequently, the Ninth Circuit panel did not decide whether fees were appropriate under Rule 11 or 42 U.S.C. § 1988, the only basis argued to the trial court that imposed the sanctions. The panel concluded the sanctions could be awarded the City of Santa Monica, a non-party, because the city represented Wiles as a city employee. Memorandum decision at A2 n.4.

REASONS FOR GRANTING WRIT

I. The Court Should Grant Review To Decide Whether Due Process Guarantees Demand That Party Have Notice And An Opportunity To Be Heard Before Sanctions Are Imposed Under The Court's Inherent Power.

While it is settled that a court has the inherent power to award sanctions, see *Chambers v. NASCO, Inc.*, *supra*, not settled is the notice required before a party can be sanctioned under that power. Here, it is undisputed that petitioners never received notice of sanctions under the court's inherent authority; the only notice was of sanctions under F.R.Cv.Proc. Rule 11 and 42 U.S.C. § 1988.

Research discloses no decision of this Court addressing the issue of whether a party or his attorney must receive notice of the authority under which sanctions are sought. Nor, apparently, has the Ninth Circuit addressed this issue. The Third Circuit, though, has. In *In re Tutu Wells Contamination Litigation*, 120 F.3d 368 (3rd Cir. 1997), the trial court suspended three attorneys because of alleged discovery abuses. The attorneys appealed, claiming that they had never received proper notice of the basis for suspending them. The court of appeals agreed, reversing the trial court's order of suspension:

> The party against whom sanctions are being considered is entitled to notice of the legal rule on which sanctions would be based, the reasons for the sanctions, and the *form* of the potential sanctions. *See Simmerman v. Corino*, 27 F.3d 58, 64 (3rd Cir. 1994). Without such notice, the opportunity to be heard would be meaningless: "(o)nly with this information can a party respond to the court's concerns in an intelligent manner." *Id.* In other words, a party cannot adequately defend himself against the imposition of sanctions unless he or she is aware of the issues that must be addressed to avoid the sanctions. As one treatise writer has explained, "(d)ramatic differences in the relief being considered by the district court may lead to substantially different (e.g., more detailed, differently directed) responses by the alleged offender. Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 17(D)(1)(d), at 343 (2d ed.1994) (discussing Rule 11 sanctions in particular); *see also Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 34 (Stephen B. Burbank, reporter, 1989).

In re Tutu Wells Contamination Litigation, 120 F.3d at 379.

This case illustrates the point. Respondent Wiles sought fees under § 1988 and Rule 11, arguing that "plaintiff's action against this moving defendant was unreasonable, frivolous, vexatious and without merit." AER at 25. Petitioners' response was simple. Fees cannot be imposed against Mr. Mann and Mr. Cook under § 1988 because they are *non*-parties. Fees cannot be imposed under § 1988 against Mr. Menjivar because the Ninth Circuit previously held that his action against Wiles was meritorious. Fees cannot be imposed

under Rule 11 because there is no signed pleadings that forms the basis of Rule 11 sanctions and furthermore, there is no compliance with the "safe-harbor" provisions of Rule 11. *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 364-65 (9th Cir. 1988); Rule 11(c)(1)(A), Federal Rules of Civil Procedure. This alone was sufficient to defeat Wiles' motion.

Had petitioners been told that fees were sought under the trial court's inherent power based on Mr. Cook's purported bad faith, petitioners' response could and would have been far different. Mr. Menjivar could and would have pointed out that he is not responsible for his attorney's purported misconduct and therefore he should not be punished for something his attorney did without Mr. Menjivar's knowledge. Mr. Mann is in a similar position as Mr. Menjivar – the purported bad faith conduct is all attributable to Mr. Cook. Why, then, should Mr. Mann be punished? *Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644, 649-50 (9th Cir. 1997) (Rejecting vicarious liability for imposition of sanctions under the court's inherent power against offending counsel's co-counsel.). Finally, in response to the claim now made that Mr. Cook rejected a reasonable settlement offer and persisted in prosecuting a case that Mr. Cook did not have an intention of proving at trial (Memorandum decision A3), Mr. Cook could and would have pointed out he had no choice but to prosecute the case up through the day of trial; the purported settlement offer was so minimal and meaningless he had no choice but to reject it; and that he did not need a witness list if his client had showed up on the day of trial:

> • Regarding the settlement effort made a few days before trial, it was Mr. Cook who called defense counsel, and not the other way around (as the Panel misleadingly implies). Furthermore, the defense settlement offer Mr. Cook rejected was a waiver of costs in exchange for a

dismissal. AER at 32 (At ¶3 of her declaration, defense counsel states that Mr. Cook called her to discuss settlement; at ¶4, defense counsel recites the defense offer to waive costs that Mr. Cook rejected).

• The only witness plaintiff had to prove his case was himself. If the jury believed plaintiff, his testimony would be sufficient to sustain a jury verdict in plaintiff's favor. Memorandum decision filed March 25, 1997, in 9th Circuit No. 95-56702 (In earlier appeal, relying on plaintiff's testimony, Ninth Circuit reverses summary judgment granted by trial court in defendant Wiles' favor).

• Mr. Cook could not call any witnesses at trial because his only witness was plaintiff and plaintiff, despite being repeatedly informed of the trial date, had failed to respond to his counsel's inquires. AER at 39 (¶3 of Cook decl.).

• Had Mr. Menjivar contacted Mr. Cook as late as the morning before trial, Mr. Cook could have presented a case. AER at 39 (¶3 of Cook decl.).

In short, had Mr. Cook received notice and an opportunity to be heard, he could have explained it was Mr. Menjivar's failure to communicate with his attorneys that led to counsel's inability to prosecute the case on the day of trial. Thus, by denying petitioners -- and in particular Mr. Cook -- notice and an opportunity to be heard, the panel upheld sanctions against Mr. Menjivar, Mr. Mann and Mr. Cook, based on the Panel's incorrect suggestion that Mr. Cook had abandoned his client and persisted in prosecuting a case Mr. Cook had no intention of prosecuting. Memorandum decision at 3. Because they did not have notice and an opportunity to be heard, Mr. Mann and Mr. Cook were denied the opportunity to explain that Mr.

Menjivar had placed Mr. Cook in a no-win situation.

II. The Court Should Grant Review To Decide Whether, Under A Court's Inherent Power To Award Sanctions, The Court May Direct Payment To A Non-Party.

Research discloses no decision of this or any other court, save one, on the authority of a trial court to direct payment of money to a non-party. The one court that has addressed found that a trial court lacks the power to "redistribute wealth" to non-parties. In *In re Tutu Wells Contamination Litigation, supra*, the trial court ordered the sanctioned attorneys to pay money to non-parties. 120 F.3d at 372. The Third Circuit held this was error:

> Notwithstanding the variety of tools available to a court under its inherent powers, we believe that an order directing a party to the litigation to remit funds to a third party is outside the scope of a court's inherent power.

120 F.3d at 383; see also 120 F.3d at 385 n.18 (court expresses grave doubt that the courts have the power under any basis for ordering payment of money to non-parties).

Respondent Wiles admitted that he did not incur any liability for attorneys' fees. The only fees incurred were those borne by the City of Santa Monica, a non-party.

CONCLUSION

The ability to impose sanctions is, like the power to tax, the power to destroy. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1821). Here, without notice to petitioners a trial court's inherent power to impose monetary sanctions was used to punish petitioners. The result now lies buried in an unpublished decision.

This underscores the need for this Court's review. For if a court can affirm substantial monetary basis through means calculated not to catch anyone's attention other than the aggrieved parties, then this Court should make sure that the aggrieved parties obtain the notice and opportunity to be heard to which they are constitutionally entitled. It is the only protection anyone has.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 13 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

EDGAR ORLAND MENJIVAR,
Plaintiff,

and

ROBERT MANN; DONALD W. COOK, ESQ.
Appellants,

v.

CITY OF SANTA MONICA; JAMES T. BUTTS;
UNKNOWN WILES,
Defendants-Appellees

No. 98-55443
D.C. No. CV-94-04242-R

AMENDED MEMORANDUM[1]

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted February 4, 1999[2]
Pasadena, California

Before: HUG, Chief Judge, BROWNING, Circuit Judge, ZILLY, District Judge.[3]

Edgar Orlando Menjivar, plaintiff in the underlying civil rights action and Robert Mann and Donald W. Cook, attorneys for Menjivar, appeal the district court's order granting $7,500.00 in attorneys' fees to the City of Santa Monica ("the City").[4] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Appellants contend that the district court abused its discretion by awarding attorneys' fees under 42 U.S.C. § 1988 and Fed. R. Civ. P. 11. We review a district court's award of attorneys' fees for an abuse of discretion. Optyl Eyewear Fashion Int'l. Corp. v. Style Cos., Ltd., 760 F.2d 1045, 1048 (9th Cir. 1985).

The City requested fees under 42 U.S.C. §1988 and Fed. R. Civ. P. 11, but the district court's order does not indicate the authority relied upon to award attorneys' fees. Regardless of whether fees are appropriate under § 1988 or Rule 11, a district court can rely on its inherent power to sanction bad faith acts of counsel and the parties and award attorneys' fees. Roadway Express, Inc. v.

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[2] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

[3] Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

[4] Appellants assert that the City of Santa Monica cannot be awarded fees because it was not a party at the time sanctions were imposed. We conclude that fees were properly awarded to the City for their representation of Officer Wiles as a city employee.

Piper, 447 U.S. 752, 766 (1980); Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991). In order for the district court to rely on its inherent power, there must be an explicit finding that the underlying conduct constituted bad faith, unless the bad faith is patent from the record. Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648-49 (9th Cir. 1997); B.G. Toombs v. Leone, 777 F.2d 465, 471 (9th Cir. 1985). If the record provides sufficient evidence of bad faith and specific findings are unnecessary to understand the issue giving rise to the sanctions, we may infer the necessary finding of bad faith. Toombs, 777 F.2d at 471 (citing Optyl, 760 F.2d at 1051).

The record in this case clearly supports an inference that the district court found that Appellants acted in bad faith. Six days before trial Cook refused the City's settlement offer and stated that he would see opposing counsel in court. Cook appeared the morning of trial without his client and stated that (1) he had no witness list, (2) he was unable to call any witnesses, (3) he did not expect to be able to prove his case and (4) he had not been in contact with his client.[5] Menjivar was not in contact with his attorneys and failed to appear the day of his trial. The record before us contains ample evidence to infer the requisite bad faith finding. Accordingly, we find that the district court did not abuse its discretion in awarding attorneys' fees. We do not reach the question of whether the fees were appropriate under § 1988 or Rule 11, because we conclude that the fees can be upheld pursuant to the court's inherent power.

AFFIRMED.

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[5] Appellants argue that Mann never appeared before the court and should therefore not be sanctioned. We conclude the sanctions are appropriately imposed upon Mann because he is listed as counsel of record in the district court's docket and all documents filed with the court bore his name.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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EDGAR ORLANDO MENJIVAR,
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and

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v.

CITY OF SANTA MONICA; JAMES T. BUTTS;
UNKNOWN WILES,
Defendants-Appellees

No. 98-55443
D.C. No. CV-94-04242-R

ORDER

Before: HUG, Chief Judge, BROWNING, Circuit Judge, ZILLY, District Judge.[1]

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

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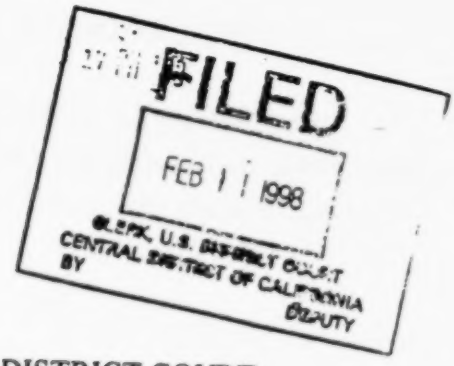
[1] Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

The full court as been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc are denied.



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDGAR ORLANDO MENJIVAR,	) CV94-4242 R
	)
Plaintiff,	) ORDER GRANTING
	) DEFENDANT'S
v.	) MOTION FOR
	) ATTORNEY'S
CITY OF SANTA MONICA, et al.,	) FEES
	)
Defendants.	)
	)

This matter came on regularly before this Court on January 20, 1997 at 10:00 a.m., before the Honorable Manuel L. Real, on the Motion for Order Granting $7,500.00 Attorneys' Fees to be paid to City of Santa Monica by plaintiff's counsel, Law Offices of Robert Mann and Donald W. Cook.

Debra S. Kanoff appeared on behalf of defendant and moving party, Donald W. Cook appeared on behalf of Plaintiff.

All pleadings and papers on file in this case having been read and examined by the Court and arguments having been presented,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

The Motion for Attorneys' Fee is GRANTED and that plaintiff and the Law Offices of Robert Mann and Donald W. Cook jointly and severally shall pay to the City of Santa Monica the sum of $7,500.00 in attorneys' fees.

Dated: Feb 11 1998

/S/ Manuel L. Real

MANUEL L. REAL
United States District Judge